The Honorable Patrick Oishi
Noted for Hearing: June 21, 2019, 10:00 a.m.
With Oral Argument
Opposition Papers

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

1426 FIRST AVENUE LLC, Plaintiff, v. CITY OF SEATTLE, Defendant.	No. 18-2-21872-1 SEA

PLAINTIFF'S OPPOSITION TO CITY OF SEATTLE'S SECOND MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

There is no merit to the City's motion. First, there is no need to revisit old issues that Judge Roberts ruled on. Of nine issues presented here, four were briefed and squarely ruled on last year.

Second, even as to new issues, the City fails to show that it should prevail. Tellingly, the City starts off trying to convince the Court that its Ordinance was no big deal because it only maintains the "*status quo*." This is demonstrably wrong. The *status quo* was that (i) a 440' residential tower could be built at the subject property under its DMC 240/290-440 zoning and (ii) the subject property was not subject to the overlay controls of the Pike Place Market Historical District Guidelines. The Ordinance dramatically changed that. It altered the *status quo* by (i) making the property subject to the very restrictive Guidelines overlay; and (ii) stripping away what the property's zoning otherwise freely permitted, i.e., the ability to build a 440' residential tower. The City says the DMC zoning has not been changed, but it does not dispute that the Guideline overlay now applies and that the Guideline prevents what the zoning otherwise permits. Indeed, that was precisely why the City enacted the Ordinance: kill redevelopment.

Because substantively this was a site-specific rezone, or at a minimum, application of the Guideline overlay to this parcel, the City's action was not legislative. Instead, because it was site-specific, it was quasi-judicial and the Appearance of Fairness doctrine applies. Judge Roberts already ruled that plaintiff's Appearance of Fairness claim should be tried.

The City also tries to misdirect the Court by focusing on its strawman argument that no permit application was filed after the Ordinance went into effect. That is of no legal consequence to the claims in the case at this point. Indeed, the City makes no formal ripeness argument even now.

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The City ignores both Washington and U.S. Supreme Court precedent when it argues that the deferential "rational basis" review standard applies to the constitutional challenges. This is flatly wrong.

Finally, the City curiously spends an ordinate amount of ink laying out its view of the alleged historical significance of the Showbox (by way of impermissible hearsay). Yet this only highlights two things. First, if there is historical significance to the Showbox, the City did not follow any of the preexisting quasi-judicial procedures that should be followed for a landmark designation. It did by *fiat* what the Landmarks Board has notice, procedures, hearings and appeal rights for. Second, the City's recitation of the Showbox's history shows that the property has had no connection whatsoever with the Pike Place Market for the last 80 years.

The claims in this lawsuit do not rise or fall on the disputed facts of historic merit. There is a separate proceeding going on before the Landmarks Board to consider historic preservation. This Court should not and need not wade into that other proceeding.

II. COUNTERSTATEMENT OF FACTS

The City's recitation of its version of the property's history is entirely based on hearsay. It presents not even an expert witness qualified to review historic documents or opine regarding history. Thus, the "facts" recited on pages 2:9-3:21[1] of its motion are not admissible on summary judgment. CR 56(e) (evidence must be admissible); ER 802 (hearsay). Accordingly, Plaintiff hereby moves to strike the "facts" asserted at pages 2-3 of the City's motion and paragraphs 4, 6, 8, 11, 21 (hearsay) and 17 (legal conclusions) of the Second Whitson Declaration (Dkt. 60) and Ex. 2 to the Second Sodt Declaration (Dkt. 59). And likewise moves to strike motion Subsection C on page 4 and the reference to "some comments expressed concerns," at page 5:6-8, and pages 5:23-6:3 ("Historic Seattle also provided a brief history.…"). Not all public comments support the City. Certain public comments objected to the City's land-

[1] Dkt. 58, City's Second Mot. for Summ. J. ("2019 Mot.").

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grab. Decl. of John Tondini in Opp'n to Second Mot. for Summ. J. ("2019 Tondini Opp'n Decl."), Ex. 48 (sample of opposing constituent emails).

Essentially, what the City is arguing by attempting to put forward this inadmissible evidence is that popular acts should not be meaningfully reviewed by courts. If the public wants it, and the City does it, the City says the courts should look the other way. However, one of the fundamental reasons we have an independent judiciary is so that when government oversteps constitutional or other lawful bounds and tramples private property rights for reasons of political expediency, the courts are there to act as a check.

In any event, these historic/cultural value "facts" are contested and disputed. The City's own 2006 survey and 2007 letter (both admissions of a party opponent) are counter evidence that the property lacks historic value. Mr. Roger Forbes' Declaration is evidence of the many remodels and general state of the building. Dkt. 55, R. Forbes Decl. The City's own Unreinforced Masonry Survey reveals that the building is at "high risk" of collapse. *Id.*, Ex. A.

Plaintiff also moves to strike the Whitson Declaration's assertion of a legal conclusion that the "Ordinance does not amend the underlying zoning." 2nd Whitson Decl. ¶ 17 and 2019 Mot. at 7:7. Legal conclusions are not admissible evidence. *Stenger v. State*, 104 Wn. App. 393, 407, 16 P.3d 655 (2001). *See Hyatt v. Sellen Constr. Co.*, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985) (improper legal conclusions inadmissible). That legal conclusion itself is contested. Pursuant to Seattle Municipal Code § 23.34.122, any property within the Historical District is automatically zoned as "PMM." Thus, the property at issue, because of the Ordinance, was rezoned as of August 2018 from DMC 240/290-440 to now "PMM."

Regarding the procedural due process issues, the City concedes that the only notice sent to Plaintiff was on August 22, more than a week after the August 13 vote on the Ordinance. 2019 Mot. at 7:22-23. Thus, prior to enactment no formal notice was sent to the owner of the only land that the Ordinance impacted.

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And as for the hearing on September 19, 2018, City staffers themselves acknowledged the obvious—that it was window dressing and not meaningful. Dkt. 52 ("Tondini MPSJ Decl."), Ex. 39 ("Given that the Council already passed this legislation, the hearing likely won't be a big deal.").

Because the City crossmoves and reasserts arguments made before, Plaintiff offers the facts supporting its summary judgment motion (Dkts. 51-55) and the declarations opposing the City's earlier motion (Dkts. 26-27) as evidence to be considered in opposition to this motion.

III. ARGUMENT

A. Judge Roberts Already Ruled That Plaintiff's Appearance of Fairness Claim Should Be Tried.

The City's Issues 1, 2 and 3 (each regarding the Appearance of Fairness), as well as Issue 9 (regarding First Amendment) were fully briefed and decided by Judge Roberts on the City's first motion for summary judgment. Dkt. 13 ("2018 Mot.") and Dkt. 39 ("10/19/18 Order").

The City does not even mention this, although it cites to other parts of Judge Roberts' ruling. *See* 2019 Mot. at 8:18-21. Pursuant to King County Local Rule 7, any reapplication to a different judge required that the City tell the Court that it is making the same motion again. LCR 7(b)(7). The party also must show what "new facts or other circumstances that would justify seeking a different ruling." *Id.* The City simply reargues the same assertions. 2018 Mot. at 10-11.

Plaintiff responded to each assertion in its opposition to the first motion. Dkt. 25 ("2018 Opp'n") at 16-21; *see also* Dkts. 26-27. Judge Roberts heard oral argument and issued a ruling later that day: "**The City's motion to dismiss the plaintiff's appearance of fairness claim is DENIED. There are material issues of disputed fact in regard to this claim**." 10/19/18 Order at 2:18-19 (emphasis added).

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1. Site-Specific Actions Are Quasi-Judicial.

Contrary to what the City again argues, a local legislative body's decision to rezone specific tracts of land is considered an adjudicatory, quasi-judicial act. *Bassani v. Board of Cnty. Comm'rs for Yakima Cnty.*, 70 Wn. App. 389, 393, 853 P.2d 945 (1993). This is why the Ordinance is not "legislative," but is quasi-judicial. Because this particular rezone only applied to one property, the City cannot credibly claim that it is an "area-wide" rezone. Instead, the City Council meeting on August 13 was a "legislative body" hearing a matter determining the legal rights of "specific parties" here, the property owner. This makes it quasi-judicial under RCW 42.36.010.

A number of Seattle Municipal Code provisions, as well as City publications, also demonstrate that site-specific property decisions by the City Council are quasi-judicial. First, is the Seattle Municipal Code, which defines rezones as "quasi-judicial." SMC 23.76.004(C) at Table A, 23.76.040(A)(2). A change to an "overlay district" also is considered quasi-judicial. SMC 23.76.036(A)(1). If the Code was not enough, an informational sheet from the City of Seattle Clerk's Office confirms that "requests to rezone property" are "quasi-judicial." Dkt. 27 ("2018 Tondini Decl."), Ex. 4. The "request" here initially came from Councilmember Sawant. Tondini MPSJ Decl., Ex. 20. *See also Schnitzer W., LLC v. City of Puyallup*, 190 Wn.2d 568, 577-78, 416 P.3d 1172 (2018) (holding that the City of Puyallup was the party requesting the re-zone at issue there). The Seattle Department of Construction and Inspections, in an official publication (No. 228), also takes the position that the Appearance of Fairness Doctrine applies to "rezone applications." 2018 Tondini Decl., Ex. 5.

Tellingly, the City cites no case that holds that a site-specific rezone is "legislative." Equally important, it cites no case holding that application of a restrictive overlay to a specific site is "legislative." And, there is case law (*Bassani*, and *Schnitzer*, *supra*) that the City wholly ignores that site-specific rezones and overlay are quasi-judicial.

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2. <u>Waiver Is Inherently Factual</u>.

As was argued before, Plaintiff did object and did not waive. Plaintiff gave voice to its objection to the way the Council was proceeding immediately before the August 13, 2018, Council meeting. 2018 Tondini Decl., Ex. 6. The City complains—as it did to Judge Roberts—that this August 12, 2018, letter did not raise concerns about appearance of fairness. The City is wrong. The letter, in part, states:

> Our client has retained us because *it is increasingly concerned about some of the recent statements, proposals and actions taken by certain Council members regarding the zoning of this property*. These actions have occurred over the last several days without slowing down to hear from the property owners … who might be affected adversely should the City take action against properties.
>
> ….
>
> It is important for all parties involved *to be heard fairly* and accorded consideration and for rights to be recognized and protected. Process should be afforded *and both procedural and substantive fairness observed*.

Id. (emphases added).

The owner then formalized its claim of an Appearance of Fairness violation by suing on August 31, 2018, ***prior to the effective date of the Ordinance.*** Under no stretch of the authorities can there be a valid waiver of the doctrine when (i) no notice was given to the property owner, (ii) the property owner nonetheless objected, and (iii) the property owner filed a lawsuit, specifically making an Appearance of Fairness claim prior to the effective date of the offending ordinance. That is why Judge Roberts held it was a disputed factual issue.

Because the City failed to follow its own code on providing notice and holding a quasi-judicial hearing, it should not be heard to complain that the owner was not present to object. The City should be estopped from arguing waiver:

> Equitable estoppel arises when a person's statements or conduct are inconsistent with a claim afterward asserted and another has reasonably relied on the statements or conduct and would be injured by a contradiction or repudiation of them. **The effect of equitable estoppel is to preclude a party from offering** an explanation or **defense that the party would otherwise be able to assert**. Unless only one reasonable inference can be drawn from the evidence, equitable estoppel is an issue of fact.

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Shows v. Pemberton, 73 Wn. App. 107, 110-11, 868 P.2d 164 (1994) (emphases added) (citations omitted).

At a minimum, just as Judge Roberts ruled, there are issues of material fact that preclude summary judgment. Notably, the City does not contest that the Councilmembers' actions violated the doctrine. *See* Dkt. 17, Answer ¶¶ 43-46, and 2018 Tondini Decl. ¶ 16. Emails and social media posts show the ex parte contacts, prejudgment and bias. 2018 Tondini Decl., Exs. 8, 9, 11, 12, and 13.

B. <u>Seattle Code and Constitutional Procedural Failures Defeat the City's Procedural Due Process Arguments</u>.

The next issue in the City's motion is a cross motion on Plaintiff's procedural due process claim. The City concedes that due process is met only when "the process was proper under the applicable law and procedure." 2019 Mot. at 16:16-17. Both sides agree on that standard, but not the applicable law and procedure.

The City mistakenly argues that the proper procedure is to be found in RCW 36.70A.390. That statute applies only to area-wide moratoria-type actions and area-wide interim zoning and controls. The City tries to fit into the statute because it needs to try to justify the admitted fact that it gave no proper advance notice to the owner that it was considering either a site-specific rezone or district overlay to the Plaintiff's property.

In contrast, Plaintiff contends that the procedures that had to be followed are those for site-specific rezones and the application of overlays to a property. Both of which are described in the Seattle Municipal Code as "Type IV" Council quasi-judicial decisions. Or, if the City is attempting to preserve a historic structure, then the procedures that had to be followed are those for Landmarking.

Each of these is quasi-judicial and each requires written notice and a fair opportunity to be meaningfully heard in advance. Pursuant to specific Seattle Municipal Code provisions, property owners to be impacted by either a site-specific rezone or an overlay action must be

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given notice by both physical on-site posting and mail. SMC 23.76.052(C), 23.76.012(A)(2)(c), 23.76.042. Applications for Type IV decisions must be made to the Director in the first instance and not to the Council directly. SMC 23.76.036-.056. None of this was followed. Dkt. 26, 2018 E. Forbes Decl. ¶ 2; Dkt. 55, R. Forbes Decl. ¶ 6. The City does not contend otherwise.

The City concedes that the Ordinance changed the *status quo* by placing "additional land use controls on Plaintiff's property." 2019 Mot. at 17:15. This additional layer of control by way of the Guidelines is an "overlay." Tondini MPSJ Decl., Ex. 6 (Staley Dep.) at 21-22, 105-106, and Ex. 43 (additional layer of regulations is an "overlay"). As was stated in a similar case, "regardless of the labels applied to the Ordinance, its effect is to require a use permit for Jachimek's C-2 property but not for C-2 property in other parts of the City. We agree with the trial court that the Ordinance 'in fact and in law [creates] an overlay zone.'" *Jachimek v. Super. Ct.*, 169 Ariz. 317, 319, 819 P.2d 487 (1991) (voiding a special district requirement as an improper overlay). Analogously here, Plaintiff's property now has the additional burden of the Guidelines, when other properties on the same east side of First Avenue do not. This by itself is a Type IV quasi-judicial decision. SMC 23.76.036(A)(1).

There is no merit to the City's argument that the Ordinance only preserved the *status quo* and was an area wide interim action that fits within RCW 36.70A.390.[2] The City argues *Matson v. Clark County Board of Commissioners*, 79 Wn. App. 641, 904 P.2d 317 (1995), supports its position. 2019 Mot. at 17:3. However, in that case, Clark County imposed a county-wide moratorium on **all** "new cluster subdivisions in agricultural and forest zoning district" and repealed an exemption for **all** "large lot subdivisions." *Matson*, 79 Wn. App. at 643-44. In the only other case the City cites, *Samson v. City of Bainbridge Island*, 683 F.3d 1051 (9th Cir. 2012), the moratorium at issue eventually covered the **entire** City of Bainbridge Island and applied to **all** "new overwater structures (piers, docks and floats) and new shoreline armoring

[2] The Historical District Guidelines are not new. The Second Sodt Declaration notes that they have not changed since 2013. 2nd Sodt Decl. ¶ 3 & Ex. 1.

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(bulkheads and revetments) where none has previously existed." *Id*. at 1055 (describing rolling and expanding moratorium). Those kinds of area-wide moratoria are what RCW 36.70A.390 addresses, not site-specific rezones and application of overlays to a single property.

If a moratorium on all development downtown or near the Market was put in place, then there would be some gravity to the City's argument, but it did not do that.

The City spends a great deal of space arguing that this lack of due process was justified by the alleged "historic" nature of the property. If the City wanted to take action because, contrary to its earlier positions in 2006 and 2007, it now viewed the property as having historical significance, then it should have followed the City's own Landmarking procedures, which also require notice and an opportunity to be heard before an action is taken. SMC 25.12.380-580. But the City did not do that.

On the conceded facts, applicable Seattle Municipal Code procedures were not followed and this plainly does not comport with due process, which as the City concedes requires at a minimum that "the process was proper under the applicable law and procedure." 2019 Mot. at 16:16-17.

But, even if the Seattle Municipal Code is put aside, and even if RCW 36.70A.390 is applied, the admitted lack of notice for any meaningful hearing before enactment of an Ordinance to kill a $41 million sale independently violates *Constitutional* procedural due process. One minute for public comment at meetings that the property owner was never given formal notice of is, as a matter of law, insufficient to meet the Constitutional requirement for notice and a fair opportunity to be *effectively* heard. Nor does having a faux hearing after the fact pass Constitutional muster. "Notice and [a meaningful] opportunity to be heard are the hallmarks of procedural due process." *Ludwig v. Astrue*, 681 F.3d 1047, 1053 (9th Cir. 2012) (alteration in original) (internal quotation marks omitted). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). As was

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briefed in Plaintiff's motion for summary judgment (Dkt. 51, "Pl.'s Mot." at pages 22-25), several precedents establish that invalidation is the consequence for failing to afford an affected party procedural due process. The City's motion should be denied.

C. <u>The Standard Against Which the Substantive Due Process Claim Is Gauged Is Far More Rigorous Than the City Contends</u>.

1. <u>Fundamental Rights Are at Issue</u>.

The City's motion on substantive due process fails to address controlling Washington Supreme Court cases. The City also is incorrect in arguing that the Ordinance does not implicate "fundamental" rights. 2019 Mot. at 17:13-20. Washington recognizes that ownership decisions about disposition of real property, *including by leasing,* is a fundamental property right. Judge Parisien ruled on this precise issue just last year. *Yim v. City of Seattle*, King Cnty. No. 17-2-05595-6 SEA, Order re Mots. for Summ. J. (Mar. 28, 2018) ("*Yim* SJM Order"). There, she found that "[w]hile the City can regulate the use of property so as not to injure others, a law that undertakes to abolish or limit the exercise of rights beyond what is necessary to provide for the public welfare cannot be included in the lawful police power of the government." She invalidated the ordinance under substantive due process among other violations. *Id*. at 5-6.

Yim does not stand alone. It was built upon decades of precedent. The right to "acquire and hold property" are "fundamental rights which belong to the citizens of the state by reason of such citizenship." *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902). Washington recognizes "fundamental attributes of property ownership," such as the right to exclude others, dispose of and/or transmit property. *See, e.g., Guimont v. Clarke*, 121 Wn.2d 586, 602, 854 P.2d 1 (1993). In *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 363-65, 13 P.3d 183 (2000), the Supreme Court emphasized that the right of a property owner to decide when and to whom it wanted to sell was a fundamental attribute of ownership that was not to be interfered with. *Id*. at 361-64. Yet here, the City intentionally "killed" a sale.

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The Ordinance invades and takes away ownership control over fundamental property rights from the owner and puts it into the hands of the Historic District Commission. The Ordinance destroys "part of 'the bundle of sticks' which the owner enjoys as a vested incident of ownership." *Manufactured Housing*, 142 Wn.2d at 367 (footnote omitted).

2. <u>The Rational Basis Test Does Not Apply</u>.

The cases the City cites do not change Washington's interpretation of due process. *Yagman v. Garcetti*, 852 F.3d 859 (9th Cir. 2017), addressed parking tickets, not real property rights. In *Samson v. City of Bainbridge Island*, 683 F.3d 1051 (9th Cir. 2012), the claimants did not assert that building a dock was a "fundamental" right. *Id.* at 1058.

The City also cites to *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006), in an attempt to persuade the Court that the Constitutional bar that the City needs to pass is low. That case involved loss of a commercial driver license, not real property. The City made this same *Amunrud* argument to Judge Parisien in *Yim*, but she rejected it. *Yim*, Resp. on Cross Mots. for Summ. J., No. 17-2-03595-6, Dkt. 32 at 20-26.

The substantive due process level of review is not always rational basis. For example, when government deprives an individual of a fundamental liberty interest, then strict scrutiny applies. *See, e.g., State v. Beaver*, 184 Wn. App. 235, 243, 336 P.3d 654 (2014). When government deprives someone of a fundamental property interest, the unduly oppressive test applies. *See, e.g., Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990). And when government deprives someone of a non-fundamental liberty interest, like the right to have a driver's license, then rational basis applies. *Amunrud*, 158 Wn.2d at 219-21.

Because the Ordinance deprives the owner of the right to freely alienate by leasing to certain types of businesses, and because its very purpose was to "kill" a sale of the property, the appropriate standard of review is the unduly oppressive test. *See Manufactured Hous.*, 142 Wn.2d at 363-65; *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 21-24, 829 P.2d 765 (1992) (applying the test to Seattle's housing preservation ordinance); *Guimont*, 121 Wn.2d at 609

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(striking down a mobile-home tenant relocation ordinance under the unduly oppressive test); *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992) (applying the unduly oppressive test to tenant relocation assistance).

Washington courts did not change course regarding property rights after addressing professional licensure in *Amunrud*. The "level of review in a due process challenge depends on the nature of the interest involved." *Nielson v. Wash. Dep't of Licensing*, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013). Instead, Washington continues to apply the unduly oppressive test to property deprivations. *See, e.g., Cradduck v. Yakima Cnty.*, 166 Wn. App. 435, 271 P.3d 289 (2012).

Federal law is no different. The U.S. Supreme Court has long held that restraints on property rights are subject to heightened scrutiny. *See, e.g., Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (A restriction on owner's rights in property must *substantially advance* a *legitimate* public purpose.). *Euclid* is not a "rational basis" test. Following *Euclid*, governments "may not, under the guise of the police power impose restrictions that are *unnecessary* and *unreasonable* upon the use of private property or the pursuit of useful activities." *Wash. ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (voiding a Seattle ordinance that was used to block a private redevelopment of property) (emphasis added).

The U.S. Supreme Court reiterated the *Euclid* test two years later in *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928), again requiring that the regulation substantially advance a legitimate public goal. Neither *Village of Euclid* nor *Nectow* uses the phrase "rational basis." *Nectow* is a similar case to that here because there the ordinance meant that Nectow lost a $63,000 contract to sell the land. In finding a due process violation, the Court said the lost sale was a "serious and highly injurious" loss that could not stand under the 14th Amendment. *Id.* at 187-89.[3] In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005), the Court again observed

[3] *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), cited by the City (2019 Mot. at 17), involved only restrictions on the sale of misbranded milk-like products.

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that restrictions on the right to use one's property "must substantially advance a legitimate state interest" to satisfy the substantive requirement of due process.

The other federal decisions cited by the City likewise require that a land use ordinance substantially advance a legitimate government objective. *See Samson*, 683 F.3d at 1058; *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008) ("[T]here is a due process claim where a 'land use action lacks any substantial relation to the public health, safety, or general welfare.'") (*quoting Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855-56 (9th Cir. 2007)).

"While the City can regulate the use of property so as not to injure others, a law that undertakes to abolish or limit the exercise of rights beyond what is necessary to provide for the public welfare cannot be included in the lawful police power of the government." *Yim* SJM Order at 6 (*citing Ralph v. City of Wenatchee*, 34 Wn.2d 638, 644, 209 P.2d 270 (1949)). The balance between property rights and government power is why there is a three-prong inquiry, including the "unduly oppressive" prong in *Presbytery*, 114 Wn.2d at 330-31.

For examples of how the three-part test is applied, the Court can look to *Sintra*, 119 Wn.2d at 20-24, *Guimont*, 121 Wn.2d at 608-613, and *Yim*. Each finds a substantive due process violation. The City makes no attempt to meet or defeat the proper test. Plaintiff proved the ordinance fails. *See* Pl.'s Mot. at 14-18.

D. <u>The Ordinance Fails the Rational Basis Test Even If It Applies</u>.

But even if the Court were to ignore controlling cases and adopt the rational basis test, the Ordinance still fails. *See* Pl.'s Mot. at 14-17 and 20-21.

The City's first attempt to argue a rational basis is its claim that the Ordinance seeks to preserve historic structures. 2019 Mot. at 19:8-14. Historic preservation could be a justification for a city-wide historic property ordinance—*like the Landmark statute*—but the Ordinance at issue here was for just a single property so it is not rationally related to this goal. And the City already has a Landmark ordinance to adequately serve that goal. SMC 25.12.020 *et seq.*

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Moreover, the City's own Council Briefing handout identified and described other significant historic properties near the Market, but none of them were included in the Ordinance. Tondini MPSJ Decl., Ex. 36. Therefore, protection of historic properties was not rationally served by the Ordinance because it left untouched and unaffected many other nearby historically significant properties.

The City next argues that the Showbox is so unique that it by itself is rationally subject to the Ordinance. What is that uniqueness? The City says it's because the property is "adjacent to" the Historical District and was "uniquely threatened" with redevelopment. But this ignores the Hahn Building, which sits right at the corner of First Avenue and Pike at the entrance to the Historical District. The City did not impose the Ordinance on that property even though it is being redeveloped into a 14-story modern steel and glass hotel. Tondini MPSJ Decl., Ex. 44; R. Forbes Decl. ¶ 9. The Hahn Building was not Landmarked, nor was it put into the District. Tondini MPSJ Decl., Ex. 16 (McAuliffe Dep.) at 81-83 & Ex. 45. *See also* 2019 Tondini Opp'n Decl. Exs. 54-57. And again, nor were any of the other First Avenue buildings identified in the Council Briefing as adjacent to the Market. Tondini MPSJ Decl., Ex. 36. Also, the many high-rise buildings within yards of the Market show that the City is not concerned with all adjacent redevelopment, just this one property's redevelopment. Dkt. 53, R. Settle Decl. ¶ 7 & Ex. D.

The City also cannot base rationality on public opinion. *See* Pl.'s Mot. at 11. In *Parkridge v. City of Seattle*, 89 Wn.2d 454, 462-63, 573 P.2d 359 (1978), this was made abundantly clear. Seattle reversed spot-zoned property from allowing apartments to only single-family residential in response to neighbor opposition and public sentiment. The Supreme Court held it to be an invalid spot zone. *Id.* Swings of popular opinion would be the exact opposite of rational. It instead is "arbitrary and capricious." *Id.* at 459. To be fair and consistent are hallmarks of avoiding arbitrary and capricious decisions. *See Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 222, 643 P.2d 426 (1982).

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The City's last attempt to justify the rationality of the Ordinance is by arguing that the Showbox has a historical relationship to the Market. Why? Because 80 years ago (prior to 1939), and prior to it being the Showbox, it was a grocery market. 2019 Mot. at 20:12-18. But the alleged market "connection" was lost 80 years ago and is not connected to the "Showbox." The City Council was not "saving the Market on First," it was "saving the Showbox," the music venue. *See infra Section G*. There is no rational connection between what the use was 80-years ago when it has not been used that way for 80 years. If there had been a connection to the Market, it would have been included in the Pike Place Market Plan in the 1970s. 2019 Opp'n Tondini Decl., Ex. 49. The Showbox was not included.

Moreover, those most directly in charge of the Market and the Historical District **did not think there was any rational basis or need for the Ordinance**. A proposal in 1993 to expand the Market to include certain properties on the east side of First Avenue *did not* include the Showbox. Tondini MPSJ Decl., Ex. 4. And the District Commission did not ask the City to expand the Market to include the Showbox site. In fact, it declined to even take a position on the expansion. *Id.*, Ex. 3 (Sodt Dep.) at 67, 99, Ex. 25 (8/8/18 Tr.) at 35, Ex. 16 (McAuliffe Dep.) at 84-85. In face of that set of undisputed facts, it cannot be found that the Ordinance was rationally related to any legitimate governmental interest as claimed by the City.

Instead, the illegitimate and specific intent of the Ordinance was to "kill" a lawful redevelopment deal for this one property and to close the permit application window at SDCI so Onni could not submit a permit application and vest. As a City document bluntly puts it: "This is CM Sawant's proposal to adjust the boundaries … specifically for the purposes of 'killing' the Omni [sic] Development potential development." Tondini MPSJ Decl., Ex. 22 at 2. *See also* Exs. 20-21 ("[T]his is specifically to ensure that Omni [sic] can't vest and do any development of the Showbox site."). *See also id.*, Ex. 16 (McAuliffe Dep.) at 29-32, Ex. 3 (Sodt Dep.) at 45-46; SMC 25.24.060(B)(1).

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The City does not present a winning argument to save the Ordinance. Instead as set out in Plaintiff's motion, it violates the 14th Amendment.

E. <u>The Equal Protection Claim Cannot Be Dismissed Under Either the City's Test or the Compelling Justification Test</u>.

The Ordinance fails the equal protection standard that the City says applies. The City posits: "Plaintiff must show that the City intentionally and without rational basis, treated Plaintiff differently from others similarly situated." 2019 Mot. at 18:18-19. Plaintiff, in its Motion, made just that showing and does so again above. The City selected out Plaintiff's single property because it intended to "kill" the property's redevelopment. Moreover, the Ordinance does not help preserve music venues equally, or historic sites equally or the east side of First Avenue adjacent to the Market equally. And the use of the Showbox site has been disconnected for 80 years from the Market. Thus, under the City's own test, the Ordinance violates equal protection. So even assuming the "rational relationship" standard the City urges, it cannot prevail. But that should not be the applicable standard—it is higher.

The City never comes to grips with the fact that its Ordinance invades fundamental property rights and therefore a *compelling* justification for it must exist. As a matter of controlling law, there is no compelling interest here because binding precedent has established that neither aesthetics nor historic value are a "compelling" justification for infringing fundamental rights of an owner. *See First Covenant Church of Seattle v. City of Seattle,* 120 Wn.2d 203, 222-23, 840 P.2d 174 (1992).

Next, the City fails to even address the alternative grounds for an equal protection violation: that once it determined to add the property to the Historical District, the City was required by the equal protection clause to treat this new addition like it treated the 1970 additions. That means, just as it did when it put properties in the District back in the 1970s, the City had to offer to pay fair market value for the property. Dkt. 53, R. Settle Decl. ¶¶ 10-11. Equal treatment under the law is precisely what the equal protection clauses of the State and

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Federal Constitutions are all about. "[A]ll persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985). To reiterate the City's own equal protection test: Plaintiff was intentionally and without rational basis treated differently.

"The equal protection clause requires that persons similarly situated with respect to the legitimate purposes of the laws receive like treatment." *Matter of Knapp*, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984). Here the City has refused to do precisely what it offered to do for other property owners when those properties were drawn into the District. The Ordinance fails equal protection guarantees.

F. <u>The Ordinance Was an Unlawful "Spot Zone" and the Court Has Jurisdiction</u>.

The City is fighting uphill on spot zoning because the Ordinance only applies to one property. The facts and the law are so against it that the City tries to throw whatever it can in the way.

1. <u>There Is No Jurisdiction for Spot Zoning at the GMHB</u>.

First, the City argues that spot zoning can only be challenged before the Growth Management Hearings Board ("GMHB"). Yet, tellingly, the City fails to cite any case that so holds. And that is because the City's contention is so wrong it was labeled by Division I as "border[ing] on frivolous." *Davidson Serles & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 638-39, 246 P.3d 822 (2011) (reversing dismissal of spot zone claim). The Court of Appeals emphatically held that GMHB does not have jurisdiction to review "constitutional challenges" such as the "issue of spot zoning." *Id.* The Division I opinion cites to a GMHB decision confirming that the Board does not review constitution-based challenges to comprehensive plans or development regulations. *Id.* at 639 (citing *Point Roberts Registered Voters Ass'n v. Whatcom Cnty.*, No. 00-2-0052, at 4 (Order Apr. 6, 2001)). Only the Superior Court has jurisdiction to declare rights under the declaratory relief statute and under the Constitutions of Washington and the United States. "[R]eview of land use actions relating to specific property is by the superior

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court, which must confirm that statutory and constitutional processes have been followed." *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 440, 187 P.3d 272 (2008).

"The jurisdiction of the GMHB is tightly controlled by statute. The GMHB does not have jurisdiction when a challenge does not involve an alleged violation of the GMA." *Coyne v. Growth Mgmt. Hearings Bd.*, 2016 WL 4537887, at *9 (unpublished Wn. App. Div. 3, 2016). "No provision of the GMA expressly gives the GMHB authority to consider claims of spot zoning." *Id.*

The City cites no case that holds spot zoning claims can only be heard by the GMHB. The State Supreme Court has specifically addressed and ruled that site-specific rezones are not within the ambit of the GMHB. "[A] site-specific rezone is not a development regulation under the GMA." *Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wn.2d 169, 179, 4 P.3d 123 (2000); *see also Woods v. Kittitas Cnty.*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007) ("GMHBs do not have jurisdiction to decide challenges to site-specific land use decisions because site-specific land use decisions do not qualify as comprehensive plans or development regulations.").

The zoning for the Showbox site has consistently allowed for high-rise development and was consistent with the zoning and planning for the downtown core outside the Pike Place Market. Tondini MPSJ Decl., Ex. 6 (Staley Dep.) at 33-34, 40-45. Those conditions did not change from 2017 to 2018. *Id.* Plaintiff does not need to show anything further than that and that only its parcel was down-zoned or subjected to a district overlay to prevail on its spot zoning claim. Moreover, under *Parkridge v. City of Seattle* (*see* below), it is the City's burden to show changed conditions from what was present in 2017 when the MHA upzone passed.[4]

[4] The zoning change in 2006 was found by Seattle to be consistent with the comprehensive plan. Ordinance 122054 § 2. The 2017 MHA upzone also was found to be consistent with the plan. Ordinance 125291 at Ex. B (findings of fact). 2019 Tondini Opp'n Decl., Exs. 50 & 51. In 2017 and 2018 there were no amendments to the comprehensive plan for the Market or DMC plans. *Id.*, Exs. 52, 53 & 58 (Staley Dep.) at 27-29.

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However, there also is a threshold issue that eliminates the need to even consider the City's GMHB jurisdictional argument. No defense based on GMHB allegedly having exclusive jurisdiction was raised in the City's Answer to the complaint. Dkt. 17, Answer at 24. Further, Judge Roberts' initial scheduling order required that all jurisdictional motions be heard by October 19, 2018. Dkt. 2, Scheduling Order. The City did raise a LUPA jurisdictional issue, but it did not raise GMHB jurisdiction as an issue. Dkt. 13. *See also*, RCW 36.70C.080(2) ("[A]ll motions on jurisdictional and procedural issues" were to be brought at the original hearing); *Lybbert v. Grant Cnty.*, 141 Wn.2d 29, 32, 1 P.3d 1124 (2000) (untimely defense waived).

2. <u>Burdensome Spot Zones Are Actionable</u>.

Next, the City argues that spot zoning only occurs when a rezone *favors* a landowner. 2019 Mot. at 21:22-22:7. The City is wrong. The Washington test (like other jurisdictions) applies with equal force when the spot zone "***burdens***" a particular property. In *Pierce v. King County*, 62 Wn.2d 324, 338, 382 P.2d 628 (1963), the State Supreme Court stated that spot zoning "is improper, and that one or two building lots may not be marked off into a separate district or zone and benefitted by peculiar advantages ***or subjected to peculiar burdens*** not applicable to adjoining similar lands." *Id.* (emphasis added).

The City's argument also ignores the *Parkridge* case in which it was the defendant. *Parkridge*, 89 Wn.2d at 462-63. There the Supreme Court invalidated a down zone on a set of parcels from apartments to single family residential that benefitted the public but harmed the owner. *Id.* The court emphasized that the City had the burden to justify the rezone:

> In considering the evidence, we note that (1) there is no presumption of validity favoring the action of rezoning; (2) the proponents of the rezone have the burden of proof in demonstrating that conditions have substantially changed since the original zoning, or as in this case, the 1959 amendment thereto; and (3) the rezone must bear a substantial relationship to the public health, safety, morals or welfare. We, as did the trial court find the evidence in this matter insufficient to support the rezone. ***Since the city did not carry the burden of demonstrating such a change in this neighborhood as would justify a rezone for the public health, safety, morals or general welfare, we affirm the holding below that the rezone was void***.

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Id. (emphasis added). The court also held that public support for a spot zone cannot be the basis for upholding the change. *Id.* at 462.

A spot zone that imposed a "burden" rather than a benefit also was at issue in *Woodcrest Investments Corp. v. Skagit County*, 39 Wn. App. 622, 694 P.2d 705 (1985). In that case, Woodcrest owned land that was zoned for residential development. Community residents filed a petition asking that some of that land be down-zoned to rural to thwart a specific development plan. The County approved the down-zone. Woodcrest challenged and both the Superior Court and Court of Appeals agreed: "The trial court concluded that the rezone constituted a 'site specific rezone' and the record 'fail[ed] to disclose that conditions had substantially changed since the most recent zoning enactment.'" *Id*. at 628, 630. That case precisely fits the circumstances here, where just one year prior the precise property (and others like it) were upzoned pursuant to the thoughtfully-developed MHA ordinance. Indeed, on MHA planning maps prepared by the City, the Showbox property was designated as "likely" to be redeveloped to 44 stories. Tondini MPSJ Decl., Ex. 6 (Staley Dep.) at 60-63, 69-70, 72-77, 98-100 & Exs. 10-15.

The City also argues that the Ordinance is not zoning. 2019 Mot. at 21:14-21. However, as demonstrated above, under the plain reading of SMC 23.34.122, as soon as the Ordinance placed the property into the Historical District, which the Ordinance did, it was no longer zoned DMC 240/290-440, but became zoned "PMM." This was a rezone.

But even accepting for purposes of argument that the *base zoning* did not change (a contention clearly wrong under SMC 23.34.122), the reality is that Plaintiff's property *cannot* be redeveloped pursuant to DMC 24/290-440 zoning, because it alone must now comply with the Guidelines. 2019 Mot. at 17:15 (The Ordinance placed "additional land use controls on Plaintiff's property.").

The substantive reality of what has occurred, rather than what it is called, is why spot zoning principles apply equally to whether additional land use restrictions are because of a

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rezone or whether they occur, as also happened here, because a single parcel is picked out and placed **into a district**. The very definition of spot zoning articulated by the Washington Supreme Court in *Pierce* encompassed not just zoning changes, but also placement of a parcel within a "district." "[O]ne or two building lots may not be marked off ***into a separate district*** or zone and benefitted by peculiar advantages ***or subjected to peculiar burdens*** not applicable to adjoining similar lands." *Pierce*, 62 Wn.2d at 338 (emphasis added). Under *Pierce*, regardless of whether SMC 23.34.122 also had the effect of down-zoning the property, this was a "spot-zone."

3. Spot Zoning Is Subjected to Much More Stringent Review Than the "Rational Basis" Test.

The City next unpersuasively argues that, if a spot zone survives the rational basis test, it is not illegal. 2019 Mot. at 22:11-16. But, *Bassani v. Bd of Cnty. Comm'rs*, 70 Wn. App. 389, 853 P.2d 945 (1993), which the City relies on, simply held that the zoning action there was permissible because it was generally consistent with surrounding properties and because it was bringing into code a pre-existing, non-conforming use. In contrast, both *Parkridge* and *Woodcrest* squarely hold that, if the government body cannot show a change in circumstances justifying a down-zone that affects only one or a small group of properties, it is an illegal spot zone. The City planning department witness admitted at his deposition that the conditions downtown have not changed since the 2017 upzone for the east side of First Avenue. Tondini MPSJ Decl., Ex. 6 (Staley Dep.) at 33-34, 106-08. What went through years of rational process was the MHA upzone of all of downtown in 2017, not the spot down-zone of, or the District overlay for just one property, which resulted from 10 days of poster-waving.[5]

For the reasons set out above and in Plaintiff's motion, the City's motion against the spot zone claim should be denied, and Plaintiff should prevail.

[5] The City's citation to *McNaughton v. Boeing*, 68 Wn.2d 659, 414 P.2d 778 (1966) also does not materially aid it. "Zoning cannot be a straightjacket to halt the burgeoning business and industrial life of a community." *Id.* at 661.

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G. <u>Judge Roberts Already Denied the City's Summary Judgment Motion Regarding the First Amendment Claim</u>.

Judge Roberts already ruled that the First Amendment/Compelled Speech claim should be tried because there are material issues of fact. 10/19/18 Order at 2:20-21. The City presents nothing new by way of facts or recently announced case law to change the analysis from last fall.

The undeniable goal and effect of the Ordinance is to compel music. If what the City wanted to do was save the building, then the Landmark law and procedure existed to achieve that if the building otherwise qualifies.

But the City recognized that saving the walls was not the goal. In an email regarding Landmarking, the Council was told by Historic Seattle (the landmark nominator) that *uses* inside a building could not be preserved under the Landmark statute and that something else would need to be done to preserve musical performance. 2018 Tondini Decl., Ex. 8 at 11-12. Within the District, under the Guidelines, any *<u>use</u>* of a property is required to be approved. No business *<u>use</u>* can change without the government's permission. The City found a way to achieve what it wanted—to compel the property owner to continue using the property as a musical performance venue. The path was to subject the property to the Guidelines. City Code itself makes it a duty of the Historical District Commission to mandate "continuance of uses." SMC 25.24.030(C).

The City Council's scheme and goal are laid bare by its own documents and the Councilmember statements at the August 8 Committee meeting. 2018 Tondini Decl., Exs. 8, 11 & 12. For example, Councilmember Bagshaw stated:

> CHAIR BAGSHAW: So my understanding -- Erin, you may want to dive in here and help us with this -- that in the landmark provisions as we have them now, **that the use cannot be controlled by the landmark designation. That we may be able to have exterior and interior, but landmarking does not guarantee the continued use of music in that venue.**
>
> ERIN: That's correct. So the Landmarks Board has purview over making alterations to the physical features of a landmark but do not have purview over a tenant or a type of use.
>
> CHAIR BAGSHAW: **Right. And in contrast to that, we have our Pike Place Market Historical Commission where the controls of use could**

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> **apply. Which is one of the reasons that Councilmember Sawant has been pushing so hard to get this within the district, because the commission oversees use.**

Id., Ex. 3 (8/8/18 Tr.) at 77:25-78:15 (emphases added).

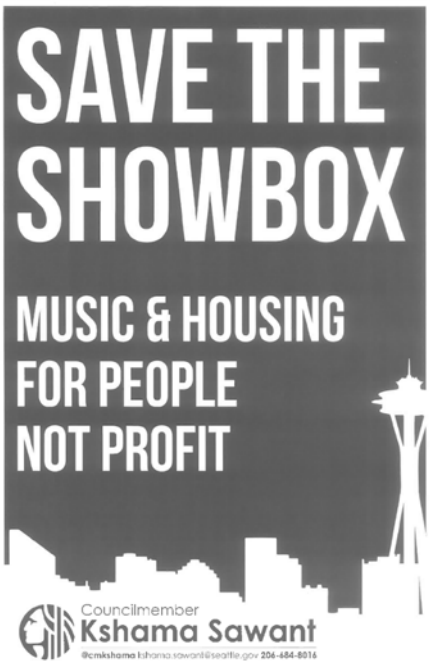
Councilmember Gonzalez stated that the goal was to preserve the current music performance use:

> I think what people are really asking us to do is to **preserve the use of the Showbox and what it does on the inside** much more so than what it looks like on the outside. So the landmarks piece takes care of what's happening on the outside. And I think what we're struggling with is **what's the best tool to use for purposes of controlling or considering controls for the actual use of the Showbox as it currently exists.**

Id. at 88:6-13 (emphases added).

Councilmember Sawant admitted to the goal of preserving music performance at her deposition. 2019 Tondini Opp'n Decl. Ex. 59 (Sawant Dep.) at 66-67, 75-76, 89-92, 96-97.

As a City-funded poster makes plain, the end-result of the Ordinance is saving music:



2018 Tondini Decl., Ex. 9.

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The U.S. Supreme Court has specifically held that music and performance art are forms of expressive activity that enjoy First Amendment protection. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 871 P.2d 1050 (1994) (music is speech). Musical performance speech is not commercial speech and as such it is not subject to the lower review the City claims. *Id.* Instead, compelled speech is given heightened scrutiny. Laws that require certain speakers to publish others' messages require heightened scrutiny. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 13-14 (1986); *Miami Herald Publ'g v. Tornillo*, 418 U.S. 241, 258 (1974).

Further, "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely ***and the right to refrain from speaking at all***." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). "The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Id.* (internal quotation marks omitted).

Nor can the City argue that it is not compelling speech because the Showbox is merely a venue for the speech of others. This argument was rejected in *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 575-76 (1995) and also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), where the Court held that parade organizers and a newspaper, respectively, were more than "passive receptacles" or "conduits" for speech because the choice of content and participants constitute the exercise of editorial control and judgment upon which the state may not intrude. "[G]overnment may not . . . compel the endorsement of ideas that it approves." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 309 (2012).

The Ordinance violates the First Amendment. The City fails to show Judge Roberts was wrong.

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DATED this 10th day of June, 2019.

BYRNES KELLER CROMWELL LLP

By /s/ John A. Tondini

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CERTIFICATION: The above signature also certifies that this memorandum contains 8,396 words, in compliance with the Local Civil Rules.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 10th day of June, 2019, a true copy of the foregoing was served on each and every attorney of record herein via King County E-Service:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington, this 10th day of June, 2019.

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Appendix of Seattle Municipal Code Sections

23.34.122 - Pike Market Mixed (PMM) zone, locational criteria.

The Pike Market Mixed zone designation shall apply to the area encompassed by the adopted Pike Place Project Urban Renewal Plan inclusive of the Pike Place Historic District.

(Ord. 117430 § 38, 1994.)

23.76.004 - Land use decision framework

A. Land use decisions are classified into five categories. Procedures for the five different categories are distinguished according to who makes the decision, the type and amount of public notice required, and whether appeal opportunities are provided. Land use decisions are generally categorized by type in Table A for 23.76.004.

B. Type I and II decisions are made by the Director and are consolidated in Master Use Permits. Type I decisions are decisions made by the Director that are not appealable to the Hearing Examiner. Type II decisions are discretionary decisions made by the Director that are subject to an administrative open record appeal hearing to the Hearing Examiner; provided that Type II decisions enumerated in subsections 23.76.006.C.2.c, d, f, and g, and SEPA decisions integrated with them as set forth in subsection 23.76.006.C.2.m, shall be made by the Council when associated with a Council land use decision and are not subject to administrative appeal. Type III decisions are made by the Hearing Examiner after conducting an open record hearing and not subject to administrative appeal. Type I, II or III decisions may be subject to land use interpretation pursuant to Section 23.88.020.

C. Type IV and V decisions are Council land use decisions. Type IV decisions are quasi-judicial decisions made by the Council pursuant to existing legislative standards and based upon the Hearing Examiner's record and recommendation. Type IV decisions may be subject to land use interpretation pursuant to Section 23.88.020. Type V decisions are legislative decisions made by the Council in its capacity to establish policy and manage public lands.

D. For projects requiring both a Master Use Permit and a Council land use decision as described in this chapter, the Council decision must be made prior to issuance of the Master Use Permit. All conditions established by the Council in its decision shall be incorporated in any subsequently issued Master Use Permit for the project.

E. Certain land use decisions are subject to additional procedural requirements beyond the standard procedures established in this Chapter 23.76. These requirements may be prescribed in the regulations for the zone in which the proposal is located, in other provisions of this title, or in other titles of the Seattle Municipal Code.

F. Shoreline appeals and appeals of related SEPA determinations shall be filed with the State Shoreline Hearings Board within 21 days of the receipt of the decision by the Department of Ecology as set forth in RCW 90.58.180.

G. An applicant for a permit or permits requiring more than one decision contained in the land use decision framework listed in Section 23.76.004 may either:

1. Use the integrated and consolidated process established in this chapter;

2. If the applicant includes a variance, lot boundary adjustment, or short subdivision approval and no environmental review is required for the proposed project pursuant to SMC Chapter 25.05, Environmental Policies and Procedures, file a separate Master Use

Permit application for the variance, lot boundary adjustment, or short subdivision sought and use the integrated and consolidated process established in this chapter for all other required decisions; or

3. Proceed with separate applications for each permit decision sought.

H. If notice is required pursuant to this Chapter 23.76, except mailed notice as defined in Section 23.84A.025, it may be provided by electronic means if the recipient provides an e-mail address to the Department. Notice to City agencies may be provided through the City's interoffice mail or by electronic means.

Table A for 23.76.004 LAND USE DECISION FRAMEWORK [1]	
Director's and Hearing Examiner's Decisions Requiring Master Use Permits **TYPE I** **Director's Decision** (Administrative review through land use interpretation as allowed by Section 23.88.020 [2])	
*	Application of development standards for decisions not otherwise designated Type II, III, IV, or V
*	Uses permitted outright
*	Temporary uses, four weeks or less
*	Renewals of temporary uses, except for temporary uses and facilities for light rail transit facility construction and transitional encampments
*	Intermittent uses
*	Uses on vacant or underused lots pursuant to Section 23.42.038
*	Transitional encampment interim use
*	Certain street uses
*	Lot boundary adjustments

*	Modifications of features bonused under Title 24
*	Determinations of significance (EIS required) except for determinations of significance based solely on historic and cultural preservation
*	Temporary uses for relocation of police and fire stations
*	Exemptions from right-of-way improvement requirements
*	Special accommodation
*	Reasonable accommodation
*	Minor amendment to a Major Phased Development permit
*	Determination of whether an amendment to a property use and development agreement is major or minor
*	Streamlined design review decisions pursuant to Section 23.41.018; if no development standard departures are requested, and design review decisions in an MPC zone pursuant to Section 23.41.020 if no development standard departures are requested
*	Shoreline special use approvals that are not part of a shoreline substantial development permit
*	Adjustments to major institution boundaries pursuant to subsection 23.69.023.B
*	Determination that a project is consistent with a planned action ordinance
*	Decision to approve, condition, or deny, based on SEPA policies, a permit for a project determined to be consistent with a planned action ordinance
*	Decision to increase the maximum height for residential uses in the DOC2 zone according to subsection 23.49.008.H

*	Decision to increase the maximum allowable FAR in the DOC2 zone according to subsection 23.49.011.A.2.n
*	Minor revisions to an issued and unexpired MUP that was subject to design review
*	Building height increase for minor communication utilities in downtown zones
*	Other Type I decisions that are identified as such in the Land Use Code
TYPE II **Director's Decision** (Appealable to Hearing Examiner or Shorelines Hearing Board [3])	
*	Temporary uses, more than four weeks, except for temporary relocation of police and fire stations
*	Variances
*	Administrative conditional uses
*	Shoreline decisions, except shoreline special use approvals that are not part of a shoreline substantial development permit [3]
*	Short subdivisions
*	Special exceptions
*	Design review decisions, except for streamlined design review pursuant to Section 23.41.018 if no development standard departures are requested, and minor revisions to an approved MUP that was subject to design review, building height increases for minor communication utilities in downtown zones, and design review decisions in an MPC zone pursuant to Section 23.41.020 if no development standard departures are requested
*	Light rail transit facilities

*	The following environmental determinations:
	1. Determination of non-significance (EIS not required)
	2. Determination of final EIS adequacy
	3. Determinations of significance based solely on historic and cultural preservation
	4. A decision to condition or deny a permit for a project based on SEPA policies, except for a project determined to be consistent with a planned action ordinance
*	Major Phased Developments
*	Downtown Planned Community Developments
*	Determination of public benefit for combined lot development
*	Major revisions to an issued and unexpired MUP that was subject to design review
*	Other Type II decisions that are identified as such in the Land Use Code
TYPE III **Hearing Examiner's Decision** (No Administrative Appeal)	
*	Subdivisions (preliminary plats)
COUNCIL LAND USE DECISIONS **TYPE IV** (Quasi-Judicial)	
*	Amendments to the Official Land Use Map (rezones), except area-wide amendments and correction of errors
*	Public projects that require Council approval

*	Major Institution master plans, including major amendments, renewal of a master plan's development plan component, and master plans prepared pursuant to subsection 23.69.023.C after an acquisition, merger, or consolidation of major institutions
*	Major amendments to property use and development agreements
*	Council conditional uses
*	Other decisions listed in subsection 23.76.036.A
TYPE V (Legislative)	
*	Land Use Code text amendments
*	Area-wide amendments to the Official Land Use Map
*	Corrections of errors on the Official Land Use Map due to cartographic and clerical mistakes
*	Concept approvals for the location or expansion of City facilities requiring Council land use approval
*	Major Institution designations and revocations of Major Institution designations
*	Waivers or modifications of development standards for City facilities
*	Adoption of or amendments to Planned Action Ordinances
*	Other decisions listed in subsection 23.76.036.C

Footnotes for Table A for 23.76.004

[1] Sections 23.76.006 and 23.76.036 establish the types of land use decisions in each category. This Table A for 23.76.004 is intended to provide only a general description of land use decision types.

[2] Type I decisions may be subject to administrative review through a land use interpretation pursuant to Section 23.88.020.

[3] Shoreline decisions, except shoreline special use approvals that are not part of a shoreline substantial development permit, are appealable to the Shorelines Hearings Board along with all related environmental appeals.

(Ord. 125603, § 69, 2018; Ord. 125558, § 58, 2018; Ord. 125429, § 23, 2017; Ord. 125387, § 1, 2017; Ord. 125374, § 3, 2017; Ord. 125291, § 46, 2017; Ord. 125272, § 61, 2017; Ord. 124747, § 4, 2015; Ord. 124378, § 76, 2013; Ord. 123963, § 27, 2012; Ord. 123939, § 17, 2012; Ord. 123913, § 4, 2012; Ord. 123649, § 51, 2011; Ord. 123566, § 5, 2011; Ord. 123565, § 2, 2011; Ord. 123495, § 75, 2011; Ord. 123046, § 56, 2009; Ord. 122816, § 6, 2008; Ord. 122497, § 4, 2007; Ord. 121828 § 13, 2005; Ord. 121362 § 11, 2003; Ord. 121278 § 7, 2003; Ord. 121277 § 1, 2003; Ord. 119974 § 1, 2000; Ord. 119618 § 7, 1999; Ord. 119096 § 4, 1998; Ord. 118672 § 23, 1997; Ord. 118012 § 23, 1996; Ord. 117598, § 3, 1995; Ord. 117263 § 53, 1994; Ord. 117202 § 11, 1994; Ord. 116909 § 5, 1993; Ord. 113079 § 3, 1986; Ord. 112840 § 2, 1986; Ord. 112522 § 2(part), 1985)

23.76.012 - Notice of application

A. Notice.

1. No notice of application is required for Type I decisions, except that notice of application is required for all projects in MPC zones that are subject to Master Planned Community design review in Section 23.41.020, as described in subsection 23.76.012.B.6.

2. Within 14 days after the Director determines that an application is complete, for the following types of applications, the Director shall provide notice of the application and an opportunity for public comment as described in this Section 23.76.012:

   a. Type II Master Use Permits;

   b. Type III Master Use Permits;

   c. Type IV Council land use decisions, provided that for amendments to property use and development agreements, additional notice shall be given pursuant to subsection 23.76.058.C; and

   d. The following Type V Council land use decisions:

      1) Major Institution designations and revocation of Major Institution designations;

      2) Concept approvals for the location or expansion of City facilities requiring Council land use approval; and

      3) Waivers or modification of development standards for City facilities.

3. Other Agencies with Jurisdiction. The Director shall provide notice to other agencies of local, state, or federal governments that may have jurisdiction over some aspect of the project to the extent known by the Director.

4. Early Review Determination of Nonsignificance (DNS). In addition to the requirements of subsection A.3 of this Section 23.76.012, the Director shall provide a copy of the early review DNS notice of application and environmental checklist to the following:

   a. State Department of Ecology;

   b. Affected tribes;

   c. Each local agency or political subdivision whose public services would be

changed as a result of implementation of the proposal; and

d. Persons who submit a written request for this information and who provide an address for notice.

B. Types of notice required

1. For projects subject to a Type II environmental determination pursuant to Section 23.76.006 or design review pursuant to Section 23.41.004, the Department shall direct the installation of a large notice sign on the site, unless an exemption or alternative posting as set forth in this subsection 23.76.012.B is applicable. The large notice sign shall be located so as to be clearly visible from the adjacent street or sidewalk, and shall be removed by the applicant at the direction of the Department after final City action on the application is completed.

a. In the case of submerged land, the large notice sign shall be posted on adjacent dry land, if any, owned or controlled by the applicant. If there is no adjacent dry land owned or controlled by the applicant, notice shall be provided according to subsection 23.76.012.B.1.c.

b. Projects limited to interior remodeling, or that are subject to a Type II environmental determination pursuant to Section 23.76.006 only because of location over water or location in an environmentally critical area, are exempt from the large notice sign requirement.

c. If use of a large notice sign is neither feasible nor practicable to assure that notice is clearly visible to the public, the Department shall post ten placards within 300 feet of the site.

d. The Director may require both a large notice sign and the alternative posting measures described in subsection 23.76.012.B.1.c, or may require that more than one large notice sign be posted, if necessary to assure that notice is clearly visible to the public.

2. For projects that are categorically exempt from environmental review, the Director shall post one land use sign visible to the public at each street frontage abutting the site except that if there is no street frontage or the site abuts an unimproved street, the Director shall post more than one sign and/or use an alternative posting location so that notice is clearly visible to the public. The land use sign shall be removed by the applicant after final action on the application is completed.

3. For all projects requiring notice of application, the Director shall provide notice in the Land Use Information Bulletin. For projects requiring installation of a large notice sign or subject to design review pursuant to Section 23.41.014, notice in the Land Use Information Bulletin shall be published after installation of the large notice sign required in subsection 23.76.012.B.1.
4. The Director shall provide mailed notice of:
    a. Applications for variances, administrative conditional uses, special exceptions, temporary uses for more than four weeks, shoreline variances, shoreline conditional uses, short plats that do not exclusively create unit lots, early design guidance process for administrative design review and streamlined administrative design review, subdivisions, Type IV Council land use decisions, amendments to property use and development agreements, Major Institution designations and revocation of Major Institution designations, concept approvals for the location or expansion of City facilities requiring Council land use approval, and waivers or modification of development standards for City facilities; and
    b. The first early design guidance meeting for a project subject to design review pursuant to Section 23.76.014.
5. For a project subject to design review, except streamlined design review pursuant to Section 23.41.018 for which no development standard departure pursuant to Section 23.41.012 is requested, notice of application shall be provided to all persons who provided an address for notice and either attended an early design guidance public meeting for the project or wrote to the Department about the proposed project before the date that the notice of application is distributed in the Land Use Information Bulletin.
6. For a project that is subject to both Type I decisions and Master Planned Community design review under Section 23.41.020, notice shall be provided as follows:
    a. The Director shall provide notice of application in the Land Use Information Bulletin.
    b. The Director shall post one land use sign visible to the public at each street frontage abutting the site, except that if there is no street frontage or the site abuts an unimproved street, the Director shall post more than one sign and/or use an alternative posting location so that

notice is clearly visible to the public. The land use sign(s) shall be posted prior to publication of notice of application in the Land Use Information Bulletin, and shall be removed by the applicant after final action on the Master Use Permit application is completed.

c. For a project that includes a highrise structure as defined in Section 23.75.020, the Director shall also post ten placards within the right-of-way within 300 feet of the site. The land use placards shall be posted prior to publication of notice of application in the Land Use Information Bulletin, and shall be removed by the applicant after final action on the Master Use Permit application is completed.

d. Mailed notice shall be provided consistent with subsection 23.76.012.B.5.

7. No notice is required of a Type I determination whether a project is consistent with a planned action ordinance, except that if that determination has been made when notice of application is otherwise required for the project, then the notice shall include notice of the planned action consistency determination.

C. Contents of Notice.

1. The City's official notice of application is the notice placed in the Land Use Information Bulletin, which shall include the following required elements as specified in RCW 36.70B.110:

a. Date of application, date of notice of completion for the application, and the date of the notice of application;

b. A description of the proposed project action and a list of the project permits included in the application, including if applicable:

1) a list of any studies requested by the Director;

2) a statement that the project relies on the adoption of a Type V Council land use decision to amend the text of Title 23;

c. The identification of other permits not included in the application to the extent known by the Director;

d. The identification of existing environmental documents that evaluate the proposed project, and the location where the application and any studies can be reviewed;

e. A statement of the public comment period and the right of any person to comment on the application, request an extension of the comment period, receive notice of and participate in any hearings, and request a copy of the decision once made, and a statement of any administrative appeal rights;

f. The date, time, place and type of hearing, if applicable and if scheduled at the date of notice of the application;

g. A statement of the preliminary determination, if one has been made at the time of notice, of those development regulations that will be used for project mitigation and the proposed project's consistency with development regulations;

h. A statement that an advisory committee is to be formed as provided in Section 23.69.032, for notices of intent to file a Major Institution master plan application;

i. Any other information determined appropriate by the Director; and

j. The following additional information if the early review DNS process is used:

1) A statement that the early review DNS process is being used and the Director expects to issue a DNS for the proposal;

2) A statement that this is the only opportunity to comment on the environment impacts of the proposal;

3) A statement that the proposal may include mitigation measures under applicable codes, and the project review process may incorporate or require mitigation measures regardless of whether an EIS is prepared; and

4) A statement that a copy of the subsequent threshold determination for the proposal may be obtained upon written request.

2. All other forms of notice, including but not limited to large notice and land use signs, placards, and mailed notice, shall include the following information: the project description, location of the project, date of application, location where the complete application file may be reviewed, and a statement that persons who desire to submit comments on the

application or who request notification of the decision may so inform the Director in writing within the comment period specified in subsection D of this Section 23.76.012. The Director may, but need not, include other information to the extent known at the time of notice of application. Except for the large notice sign, each notice shall also include a list of the land use decisions sought. The Director shall specify detailed requirements for large notice and land use signs.

D. Comment period. The Director shall provide a 14 day public comment period prior to making a threshold determination of nonsignificance (DNS) or publishing a decision on the project; provided that the comment period shall be extended by 14 days if a written request for extension is submitted within the initial 14 day comment period; provided further that the comment period shall be 30 days for applications requiring shoreline decisions except that for limited utility extensions and bulkheads subject to Section 23.60A.064, the comment period shall be 20 days as specified in Section 23.60A.064. The comment period shall begin on the date notice is published in the Land Use Information Bulletin. Comments shall be filed with the Director by 5 p.m. of the last day of the comment period. If the last day of the comment period is a Saturday, Sunday, or federal or City holiday, the comment period shall run until 5 p.m. the next day that is not a Saturday, Sunday, or federal or City holiday. Any comments received after the end of the official comment period may be considered if the comment is material to review yet to be conducted.

E. If a Master Use Permit application includes more than one decision component, notice requirements shall be consolidated and the broadest applicable notice requirements imposed.

F. The mailing list used for the Land Use Information Bulletin shall be updated annually in consultation with the Director of the Department of Neighborhoods.

(Ord. 125603, § 71, 2018; Ord. 125429, § 27, 2017; Ord. 124843, § 57, 2015; Ord. 124378, § 77, 2013; Ord. 123963, § 30, 2012; Ord. 123913, § 9, 2012; Ord. 123495, § 78, 2011; Ord. 121477 § 46, 2004; Ord. 121476 § 20, 2004; Ord. 119096 § 6, 1998; Ord. 118980 § 7, 1998; Ord. 118794 § 48, 1997; Ord. 118672 § 25, 1997; Ord. 118181 § 4, 1996; Ord. 118012 § 28, 1996; Ord. 117789 § 9, 1995; Ord. 116909 § 9, 1993; Ord. 115244 § 1, 1990; Ord. 112522 § 2(part), 1985)

23.76.036 - Council decisions required

A. Quasi-judicial Type IV Council land use decisions. The Council shall make the following quasi-judicial Type IV Council land use decisions, as well as any associated Type II decisions listed in subsections 23.76.006.C.2.c, d, f, and g and SEPA decisions integrated with such Type II decisions as set forth in Section 23.76.006.C.2.l :

1. Amendments to the Official Land Use Map, including changes in overlay districts and shoreline environment redesignations, except those map amendments listed in subsection C.1 of this Section 23.76.036;
2. Public projects that require Council approval;
3. Major Institution master plans, including major amendments as defined in Section 23.69.035, renewal of a master plan's development plan component pursuant to Section 23.69.036, and master plans prepared pursuant to subsection 23.69.023.C after an acquisition, merger, or consolidation of major institutions;
4. Council conditional uses;
5. Major amendments to property use and development agreements pursuant to Section 23.76.058; and
6. Decisions to approve, condition, or deny based on SEPA Policies that are integrated with a Type IV decision listed in subsections 23.76.036.A.1 through A.5.

B. Other quasi-judicial Council land use decisions. The Council shall also make the following quasi-judicial decisions, which are not subject to the same procedures as Type IV Council land use decisions:

1. Minor amendments to property use and development agreements pursuant to Section 23.76.058; and
2. Extensions of Type IV Council land use decisions pursuant to Section 23.76.060.

C. Legislative Type V Council land use decisions. Council action is required for the following Type V Council land use decisions, as well as any associated Type II decisions listed in subsections 23.76.006.C.2.c, d, f, and g and SEPA decisions integrated with such Type II decisions as set forth in Section 23.76.006.C.2. l:

1. The following amendments to the Official Land Use Map:

a. Area-wide amendments; and

b. Corrections of errors on the Official Land Use Map due to cartographic and clerical mistakes;

2. Amendments to the text of this Title 23;

3. Concept approval for the location or expansion of City facilities requiring Council land use approval;

4. Waiver or modification of development standards for City facilities;

5. Major Institution designations and revocations of Major Institution designations; and

6. Planned action ordinances.

(Ord. 123913, § 22, 2012; Ord. 122497 , § 6, 2007; Ord. 122054 § 84, 2006; Ord. 121477 § 52, 2004; Ord. 120691 § 29, 2001; Ord. 120609 § 16, 2001: Ord. 119096 § 9, 1998; Ord. 18672 § 26, 1997; Ord. 118012 § 41, 1996; Ord. 117570 § 23, 1995: Ord. 115165 § 11, 1990; Ord. 115002 § 15, 1990; Ord. 112522 § 2(part), 1985)

23.76.040 - Applications and requests for Council land use decisions

A. Applications for Type IV Council land use decisions.

1. Applications for all Type IV Council land use decisions except rezones shall be made by the holder of record of fee title, a City agency, or an authorized agent thereof.

2. Applications for rezones shall be made by the holder(s) of record of fee title for all of the property or properties in the area proposed to be rezoned, or the authorized agent for such holder(s) of record of fee title.

B. Applications for other quasi-judicial Council land use decisions. Applications for quasi-judicial Council land use decisions that are not Type IV decisions shall be made by all holder(s) of record of fee title of the affected property or properties, or the authorized agent for such holder(s) of record of fee title.

C. Applications for Type V Council land use decisions.

1. Applications for concept approval for the location or expansion of City facilities requiring Council approval and for waiver or modification of development standards for City facilities shall be made by a City agency or authorized agent thereof.

2. Applications for Major Institution designations and revocations of Major Institution designations shall be made by a City agency, the holder of record of fee title of the affected major institution, or authorized agent thereof.

D. Requests for Type V Council land use decisions.

1. Requests for planned action ordinances shall be made by a City agency or the holder(s) of record of fee title for the property(ies) proposed to be addressed by the planned action ordinance, or authorized agent thereof.

2. Requests for an area-wide amendment to the Official Land Use Map, correction of errors in the Official Land Use Map due to cartographic or clerical mistakes, or an amendment to the text of this Title 23 may be made by any City department or interested person.

E. A claim made by a person that they possess title to any portion of the property for which an application for a Council land use decision has been submitted, whether the claim is made by a judicially-filed pleading or not, is not grounds to suspend processing the application unless a court injunction has been issued and is delivered to the Department.

F. All applications and requests for Council land use decisions shall be made to the Director on a form provided by the Department.

G. Notice to the City Clerk

1. For Type IV Council land use decisions that do not include a design review component and are not notices of intent to prepare Major Institution master plans, and for applications for quasi-judicial Council land use decisions that are not Type IV decisions,

the Director shall provide notice of the application to the City Clerk promptly after the application is submitted.

2. For Type IV Council land use decisions that include a design review component, the Director shall provide notice of the application to the City Clerk promptly after the applicant submits a complete application to begin the early design guidance process.

3. For notices of intent to prepare Major Institution master plans, the Director shall provide the notice of intent to prepare a master plan to the City Clerk promptly after the notice of intent is received.

4. For Type V Council land use decisions, the Director shall provide notice of the application or request to the City Clerk promptly after the application or request is submitted.

H. Applications and requests for Council land use decisions shall be accompanied by payment of the applicable filing fees, if any, as established in Subtitle IX of Title 22.

I. Applications for Council land use decisions shall contain the submittal information required by the applicable sections of this Title 23, Land Use Code; Title 15, Street and Sidewalk Use; Chapter 25.05, SEPA Policies and Procedures; Chapter 25.09, Regulations for Environmentally Critical Areas; Chapter 25.12, Landmark Preservation; Chapter 25.16, Ballard Avenue Landmark District; Chapter 25.20, Columbia City Landmark District; Chapter 25.22, Harvard-Belmont Landmark District; Chapter 25.24, Pike Place Market Historical District; and other codes as determined applicable by the Director. All shoreline substantial development, conditional use, or variance applications shall also include applicable submittal information as specified in WAC 173-27-180. The Director shall make available, in writing, a general list of submittal requirements for a complete application. In the case of unusual or unique applications the Director shall determine submittal requirements.

J. Notice of Complete Application.

1. The Director shall determine whether an application for a Council land use decision is complete and shall notify the applicant in writing within 28 days of the date the application is filed whether the application is complete or that the application is incomplete and what additional information is required before the application will be complete. Within 14 days of receiving the additional information, the Director shall notify the applicant in writing if the application is still incomplete and what additional information is necessary. An application shall be deemed to be complete if the Director does not notify the applicant in writing that the application is incomplete by the deadlines in this subsection 23.76.040.J. A determination that the application is complete is not a determination that the application is vested.

2. An application for a Council land use decision is complete for purposes of this Section 23.76.040 if it meets the submittal requirements established by the Director in

subsection I of this Section 23.76.040 and is sufficient for continued processing even though additional information may be required or project modifications are undertaken subsequently. The determination of completeness shall not preclude the Director from requesting additional information or studies either at the time of the notice of completeness or subsequently, if additional information is required to complete review of the application or if substantial changes in the permit application are proposed. A determination under this Section 23.76.040 that an application is complete for purposes of continued processing is not a determination that the application is vested.

K. Failure to supply all required information or data within 60 days of a written request may result in a notice of intent to cancel. The Director may cancel the application if the requested information is not provided within the time required by the notice of intent to cancel.

(Ord. 125429 , § 29, 2017; Ord. 123913, § 24, 2012; Ord. 123495, § 80, 2011; Ord. 122497 , § 7, 2007; Ord. 122054, § 85, 2006; Ord. 121476, § 21, 2004; Ord. 118012, § 43, 1996; Ord. 117570, § 24, 1995; Ord. 117430, § 82, 1994; Ord. 112522, § 2(part), 1985)

23.76.042 - Notice of Type IV applications

Notice Required. For all Type IV Council land use decisions, notice of application shall be provided pursuant to Section 23.76.012, provided that, for amendments to property use and development agreements, additional notice shall be given pursuant to subsection 23.76.058.C.

(Ord. 123913, § 25, 2012; Ord. 122311 , § 98, 2006; Ord. 121477 § 53, 2004; Ord. 116145 § 4, 1992; Ord. 115002 § 16, 1990; Ord. 112522 § 2(part), 1985)

23.76.052 - Hearing Examiner open record predecision hearing and recommendation for Type IV Council land use decisions

A. General—Consolidation With Environmental Appeal. The Hearing Examiner shall conduct a public hearing, which shall constitute a hearing by the Council, on all applications for Type IV Council land use decisions and any associated variances, special exceptions, and administrative conditional uses. At the same hearing, the Hearing Examiner shall also hear any appeals of the Director's Type II decisions and any interpretations.

B. The Hearing Examiner may combine a public hearing on a Type IV application with any other public hearings that may be held on the project by another local, state, regional, federal, or other agency, and shall do so if requested by the applicant, provided that:

1. the joint hearing is held within the city of Seattle; and
2. the joint hearing can be held within the time periods specified in Section 23.76.005, or the applicant agrees in writing to additional time, if needed, to combine the hearings.

C. Notice.

1. The Director shall give notice of the Hearing Examiner's hearing, the Director's environmental determination, and the availability of the Director's report at least 21 days prior to the hearing by:
    a. Inclusion in the Land Use Information Bulletin;
    b. Publication in the City official newspaper;
    c. One land use sign visible to the public posted at each street frontage abutting the site except that if there is no street frontage or the site abuts an unimproved street, the Director shall either post more than one sign and/or select an alternative posting location so that notice is clearly visible to the public. For hearings on Major Institution master plans, one land use sign posted at each street frontage abutting the site but not to exceed ten land use signs;
    d. Mailed notice; and
    e. Provision of notice to the applicant and to those who have submitted written comments on the proposal, and to persons who have made a written request for specific notice and have provided an address for notice.
2. DNSs shall be filed with the SEPA Public Information Center. If the Director's decision includes a mitigated DNS or other DNS requiring a 14 day comment period pursuant to Section 25.05.340, the notice of DNS shall include notice of the comment period. The Director shall distribute copies of such DNSs as required by Section 25.05.340.
3. The notice shall state the project description, type of land use decision under consideration, a description sufficient to locate the subject property, where the complete application file may be reviewed, and the Director's recommendation and

environmental determination. The notice shall also state that the environmental determination is subject to appeal and shall describe the appeal procedure.

D. Appeal of Environmental Determination. Any person significantly interested in or affected by the Type IV Council land use decision under consideration may appeal the Director's procedural environmental determination subject to the following provisions:

1. Filing of Appeals. Appeals shall be submitted to the Hearing Examiner by 5 p.m. of the fourteenth calendar day following publication of notice of the determination, provided that if a 14 day DNS comment period is required pursuant to Section 25.05.340, appeals may be filed until 5 p.m. of the twenty-first calendar day following publication of the notice of the determination. If the last day of the appeal period so computed is a Saturday, Sunday, or federal or City holiday, the period shall run until 5 p.m. on the next day that is not a Saturday, Sunday, or federal or City holiday. The appeal shall be in writing and shall state specific objections to the environmental determination and the relief sought. The appeal shall be accompanied by payment of the filing fee as set forth in Section 3.02.125. In form and content, the appeal shall conform with the rules of the Hearing Examiner.
2. Pre-hearing Conference. At the Hearing Examiner's initiative, or at the request of any party of record, the Hearing Examiner may have a conference prior to the hearing in order to entertain and act on motions, clarify issues, or consider other relevant matters.
3. Notice of Appeal. Notice of filing of the appeal and of the date of the consolidated hearing on the appeal and the Type IV Council land use decision recommendation shall be promptly provided by the Hearing Examiner to parties of record and those who have requested notice and provided an address for notice.
4. Scope of Review. Appeals shall be considered de novo. The Hearing Examiner shall entertain only those issues cited in the written appeal that relate to compliance with the procedures for Type IV Council land use decisions as required in this Chapter 23.76 and the adequacy of the environmental documentation upon which the environmental determination was made.
5. Standard of Review. The Director's environmental determination shall be given substantial weight.

E. Conduct of Hearing. The Hearing Examiner at the public hearing shall accept evidence and comments regarding:

1. The Director's report, including an evaluation of the project based on applicable City ordinances and policies and the Director's recommendation to approve, approve with conditions, or deny the application; and
2. Specific issues related to any appeals of the Director's Type II decisions.

F. The Record. The record shall be established at the hearing before the Hearing Examiner. The

Hearing Examiner shall either close the record after the hearing or leave it open to a specified date for additional testimony, written argument, or exhibits.

G. Written Comments. Written comments on the application for a Type IV Council land use decision and the Director's report and recommendation may be sent to the Hearing Examiner. Only those received prior to the conclusion of the hearing shall be considered by the Hearing Examiner.

H. Recommendation. From the information gained at the hearing, from timely written comments submitted to the Hearing Examiner, and from the report and recommendation of the Director, the Hearing Examiner shall submit a recommendation to the Council by filing it together with the record and the original application with the City Clerk within 15 days after the close of the hearing record, provided that the Hearing Examiner's recommendation on a Major Institution master plan shall be submitted within 30 days. The recommendation to approve, approve with conditions, or deny an application shall be based on written findings and conclusions.

I. Environmental Appeal Decision. If the Director's environmental determination is appealed, the Hearing Examiner shall affirm, reverse, remand, or modify the Director's determination that an EIS is not required (DNS) or that an EIS is adequate, based on written findings and conclusions. The Director shall be bound by the terms and conditions of the Hearing Examiner's decision. If the environmental determination is remanded, the Hearing Examiner shall also remand the Director's recommendation for reconsideration. The Hearing Examiner's decision on a DNS or EIS adequacy appeal shall not be subject to Council appeal. The time period for requesting judicial review of the environmental determination shall not commence until the Council has completed action on the Type IV Council land use decision for which the DNS or EIS was issued.

J. Distribution of Decision and Recommendation. On the same date that the Hearing Examiner files a recommendation with the City Clerk, the Hearing Examiner shall provide copies of the recommendation and environmental appeal decision, if any, to the applicant, the Director, all persons testifying or submitting information at the hearing, all persons who submitted substantive comments on the application to either the Director or the Hearing Examiner, and all those who request a copy in writing and provide an address for notice. Notice of the Hearing Examiner's recommendation to the Council shall include instructions for appealing the recommendation on the Type IV Council land use decision.

(Ord. 123913, § 29, 2012; Ord. 122497, § 11, 2007; Ord. 121477 § 54, 2004; Ord. 120157 § 9, 2000; Ord. 119096 § 10, 1998; Ord. 118672 § 27, 1997; Ord. 118012 § 47, 1996: Ord. 112522 § 2(part), 1985)